No. 88-410

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNISYS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY BRIEF FOR PETITIONER

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The primary question now before the Court is whether the decision of the Federal Circuit does the harm to Government contracting and the disputes prevention and resolution processes stated in the Petition. If so, the writ should be granted.

The widely used Order of Precedence clause and Federal rule of construction against the drafter serve the dual role of disputes prevention and resolution. They have prevented mountains of litigation.

The clause resolves the numerous inevitable inconsistencies in Government contracts in accordance with the Government's predetermined order of precedence. The Federal Circuit's refusal to enforce the Order of Prec-

edence clause converts all these inconsistencies into disputes.

The failure of the Federal Circuit to apply the construction against the drafter rule is contrary to this Court's decision in *United States v. Seckinger*, 397 U.S. 203, 210 (1970) and numerous Court of Claims decisions. The Federal Circuit's decision contradicts the very reason for Congress giving that Court exclusive appellate jurisdiction in Government contract disputes.

The Memorandum For The United States In Opposision is totally non-responsive to Petitioner's primary reasons for granting the writ and only superficially responsive to the other reasons. In essence, the Government's Memorandum asserts that the decision of the Federal Circuit is correct and "fact-bound." In reality, that decision is patently erroneous and presents important legal Government contract questions which the Government's Memorandum fails to address.

The Government's Memorandum and the Federal Circuit's decision describe the inspection and acceptance provision in the Schedule as an "Inspection at Origin" provision inferring that it is some obscure and irrelevant provision having nothing to do with acceptance. In contrast, Section I of the Schedule is entitled "Inspection and Acceptance" and is the only acceptance clause in the Schedule.

It is the Schedule that granted the option rights and provided for exercise of the option "within the period specified in the Schedule." That period was "not later than 120 days after final acceptance by the Government of Item 0001." Section I of the Schedule provided for final acceptance of Item 0001 to occur as follows: "Final inspection and acceptance upon successful completion of DT&E Field Test at destination." The Schedule also contained the Order of Precedence Clause that provided

that the Schedule provisions control over other inconsistent provisions.

The assertion in the Government's Memorandum that the acceptance provisions can be harmonized is sophistry. There is no way to harmonize February 3, 1978, March 20, 1978 and March 20, 1979 as a final acceptance date for Item 0001. The Schedule made the event that occurred on February 3, 1978 the final acceptance date for exercise of the option. March 20, 1978 would have been the normal acceptance date in the absence of a contrary acceptance date and the acceptance date under the correction of deficiencies clause could have been as late as March 20, 1979. There is no way to harmonize these dates. The Board and the Federal Circuit did not harmonize any of the acceptance provisions, but simply read the controlling acceptance provision out of the contract and used the normal time for acceptance. To say that these inconsistent provisions can be harmonized is arbitrary.

The assertion in the Government's Memorandum that the decision is "fact-bound" is wrong. The contract terms are dispositive of the case. The triggering mechanism for starting the 120-day period for option exercise was final acceptance of the first production unit and there were at least three different acceptance dates contained in the contract. The one specified as controlling was successful completion of DT&E Field Test at destination. It is undisputed that "successful completion of DT&E Field Test at destination" occurred on February 3, 1978 and that the Air Force's notice of option exercise was more than 120 days thereafter. Under the terms of the contract, the option was untimely.

The April 20, 1978 letter upon which the Federal Circuit and the Government Memorandum relied was written after the contractor had stated its contrary position, and was in the context of complying with the Government's

requests in order to receive payment for the equipment. Such an absurd reliance does not convert a legal question to a "fact-bound" question. In contrast, the Contracting Officer, before the dispute arose, interpreted the contract the same as the contractor, i.e., that final acceptance would take place "at the completion of DT&E (field) Testing," which was February 3, 1978.

The attempt of the Government's Memorandum to distinguish this Court's decision in *United States v. Seckinger*, 397 U.S. 203 (1970) starts from a faulty premise. The Federal rule of construction against the drafter is applicable when there are inconsistent provisions and the interpretation of the non-drafting party is reasonable. Thus, the rule is applicable in trying to harmonize inconsistent provisions.

The assertion that the strict construction of the option clause is inappropriate because only the definition of acceptance was at issue, is misplaced. The option rights were granted by the Schedule and the starting date for the options is certainly a part of the option rights. The final inspection and acceptance provision in the Schedule expressly started the 120-day option period. That provision was to be strictly—not liberally—construed.

It is therefore respectfully submitted that the writ of certiorari should be granted for the reasons stated in the Petition.

Respectfully submitted,

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